Supreme Court, U.S.
FILED
OCT 3 1996
CLERK

(2)

No. 96-325

In The
Supreme Court of the United States
October Term, 1996

JOSE RUIZ

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ of Certiorari
To The Utah Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. SCOTT SAVAGE
Counsel of Record
CASEY K. MCGARVEY
BERMAN, GAUFIN, TOMSIC & SAVAGE
Attorneys for Respondent
50 South Main, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

44 pp

QUESTIONS PRESENTED

1. Is there a compelling reason for this Court to grant Jose Ruiz's petition for writ of certiorari in order to review an affirmed order of summary judgment in favor of Southern Pacific Transportation Company that was entered on the grounds that, as a matter of law upon the undisputed facts of record, Mr. Ruiz was acting outside the scope of his employment at the time he was injured because he was pursuing his own interests and was not under the control or supervision of Southern Pacific Transportation Company?

2. Should this Court grant certiorari to review the two questions presented by Mr. Ruiz, regarding "the quantity and quality of evidence" to defeat a motion for summary judgment granted on the basis that upon undisputed facts the plaintiff was acting outside the scope of his employment, when these issues are raised for the first time in Mr. Ruiz's Petition for Writ of Certiorari and were not considered below because they were not raised below?

LIST OF PARTIES

There are no additional parties to this proceeding who do not appear in the caption of this case. However, Southern Pacific Transportation Company is a wholly owned subsidiary of Southern Pacific Rail Corporation. Southern Pacific Rail Corporation is now owned by Union Pacific Corporation. Some shares of Union Pacific Corporation are publically traded. Southern Pacific Transportation Company owns the stock of: 1) The Denver & Rio Grande Western Railroad Company which owns a portion of the capital stock of: a) Denver Union Terminal Railway Company; and b) TTX Company; and 2) SPCSL Corp. which owns a portion of the capital stock of Southern Pacific Mexico, S.A.deC.V. Southern Pacific Transportation Company also owns a portion of the capital stock of: 1) Southern Pacific Mexico, S.A.deC.V.; 2) Central California Traction Company; 2) The Ogden Union Railway & Depot Company; 3) Portland Terminal Railroad Company; 4) Portland Traction Company; 5) Sunset Railway Company; 6) TTX Company; and 7) St. Louis Southwestern Railway Company which also owns a portion of the capital stock of: a) The Alton & Southern Railway Company; b) Arkansas & Memphis Railway Bridge and Terminal Company; c) Kansas City Terminal Railway Company; d) Southern Illinois and Missouri Bridge Company; e) Terminal Railroad Association of St. Louis; and f) TTX Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTIONAL STATEMENT 1
FEDERAL STATUTE 1
STATEMENT OF THE CASE 2
REASONS FOR DENYING THE WRIT 6

I. THE DECISIONS BY THE UTAH COURTS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT. 6

II. PETITIONER'S ARGUMENT THAT A FELA PLAINTIFF'S EMPLOYMENT STATUS IS GENERALLY A QUESTION FOR THE JURY IS MISLEADING AND MERITLESS..... 16

III. RUIZ ONLY WANTS ANOTHER CHANCE TO REARGUE HIS CASE 18

IV. THE DECISIONS BELOW WERE DECIDED CORRECTLY, AND THUS ANY REVIEW BY THIS COURT WOULD RESULT IN THE SAME OUTCOME 20

TABLE OF CONTENTS-Continued

CONCLUSION 22

APPENDIX A-BRIEF OF RESPONDENT (SOUTHERN PACIFIC) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS DATED MARCH 29, 1996 .....1a

TABLE OF AUTHORITIES

CASES: Page

Adickes v. Kress & Co., 398 U.S. 144 (1970) 8

Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986) 13

Aparicio v. Norfolk & Western Railway Co., 84F.3d 803 (6th Cir. 1996) 11,12

Atchison, Topeka & Santa Fe Railway Co. v. Wottle, 193 F.2d 628 (10th Cir. 1952) 21

Baker v. Texas & Pacific Railway Co., 359 U.S. 227 (1959) 9, 14

Brady v. Southern Railway Co., 320 U.S. 476 (1943) 9

TABLE OF AUTHORITIES - Continued

Brown v. CSX Transportation Inc.,
18 F.3d 245 (4thCir.1994) 10

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 8

Fowler v. Seaboard Coastline Railroad Co.,
638 F.2d 17 (5th Cir. 1981) 10, 20, 21

Gill v. Pennsylvania Railroad Co.,
201 F.2d 718 (3rd Cir. 1953) 10

Getty v. Boston & Maine Corp.,
505 F.2d 1226(1st Cir. 1974) 11

Harbin v Burlington Northern Railroad Co.,
921 F.2d 129 (7th Cir. 1990) 10

Metropolitan Coal Co. v. Johnson,
265 F.2d 173 (1st Cir. 1959) 21

Mullahon v. Union Pacific Railroad,
64 F.3d 1358(9th Cir. 1995) 10

NLRB v. Hendricks County Rural Electric Corp.,
454 U.S. 170 (1981) 18

TABLE OF AUTHORITIES - Continued

New York Central & Hudson River Railroad Co. v.Carr,
238 U.S. 260 (1915) 17

North Carolina Railroad Co. v. Zachary,
232 U.S. 248(1914) 9, 16, 17

Quirk v. New York, C. & St. L. R. Co., 189 F.2d 97
(7th Cir. 1951) 11, 21

Ramsey v. United Mine Workers, 401 U.S. 302 (1971) 8

Rice v. Sioux City Cemetary, 349 U.S. 70 (1955) 18

Rogers v. Chicago & Northwestern Transportation Co.,
947 F.2d 837 (7th Cir. 1991) 10, 21

Rogers v. Missouri Pacific Railroad Co.,
352 U.S. 500 (1957) 12, 14

Rudolph v. United States, 370 U.S. 269 (1962) 18

Sassaman v. Pennsylvania Railroad Co.,
144 F.2d 950 (3rd Cir. 1944) 21

Thompson v. National Railroad Passenger Corp.,
774 F. Supp. 1087 (N.D.Ill. 1991) 11

TABLE OF AUTHORITIES - Continued

Turpin v. Chicago, Burlington & Quincy Railroad Co.,
403S.W. 2d 233 (Mo. 1966) 10, 13, 15

United States v. Johnston, 268 U.S. 220 (1925) 18

Vinyard v. Missouri Pacific Railroad,
632 S.W.2d 272 (Mo. Ct. App. 1982) 10, 13, 15

Williams v. Norfolk Southern Railway Co.,
767 F. Supp.756 (E.D.Va. 1991) 11

Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 841 F.2d1347 (7th Cir. 1988) 10,13,14

STATUTES:

28 U.S.C. § 1257(a) 1

45 U.S.C. § 51 ..... 1, 2

45 U.S.C. § 56 12

MISCELLANEOUS:

Supreme Court Rule 10 6,19

Utah Rules of Civil Procedure 56 8

OPINIONS BELOW

The rulings, orders and opinions of the trial court and appellate courts of Utah, which Jose Ruiz ("Ruiz" or "Petitioner") seeks to have this court review, have not been published in any official or unofficial reporter. However, complete copies have been included in Appendix A through Appendix C of Ruiz's Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Southern Pacific Transportation Company ("Southern Pacific" or "Respondent") agrees that 28 U.S.C. § 1257(a) confers jurisdiction on this Court to consider Ruiz's Petition for Writ of Certiorari.

FEDERAL STATUTE INVOLVED

Ruiz's state court action was based solely on the Federal Employers' Liability Act, 45 U.S.C. § 51 ("FELA"), which reads, in pertinent part, as follows:

> Every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier* in such commerce . . . resulting in whole or in part from the negligence of . . . such carrier . . . . (Emphasis added.)

Ruiz also cites to the second paragraph of this statute. However, that paragraph is not relevant to the issues before this Court, nor was it

relevant below. The second paragraph only clarifies that an employee's duties for his/her employer furthers interstate commerce, for purposes of this statute, when the duties of employment in "any way directly or closely and substantially, affect such commerce." The facts on which summary judgment was granted in Southern Pacific's favor was not that Ruiz was not performing duties that furthered interstate commerce, but more fundamentally that Ruiz was not performing any employment duties for Southern Pacific at the time he was injured. On these facts, the Utah state courts below all agreed that Ruiz was not acting within the scope of his employment, as a matter of law, and none of those courts ever had to consider the next issue of whether Ruiz's conduct also somehow furthered interstate commerce within the meaning of the second paragraph of 45 U.S.C. § 51. This Court, therefore, should not be confused by Ruiz's references to such irrelevant portions of Section 51.

STATEMENT OF THE CASE

Ruiz has initiated two state court actions against Southern Pacific alleging the right to recover for the same injuries from the same incident. The action now before this Court on Ruiz's petition was brought solely under the FELA, alleging Southern Pacific was negligent as a FELA employer. Ruiz's other action also alleges Southern Pacific was negligent, but for common law reasons other than Southern Pacific's conduct as an employer. That other action still is pending and is not affected by the dismissal of this action for which certiorari is sought.

Specifically, Ruiz claims that on May 18, 1990, while he was driving to a work site, alone in his own automobile, he was injured in

a one-car rollover accident. Because the basis of the instant claim is the FELA, an essential element Ruiz has to prove before he can recover under this statute is that at the time of his roll-over accident he was acting within the course or scope of his employment.

After discovery, Southern Pacific filed a motion for summary judgment asserting that upon the undisputed material facts of record Ruiz could not establish the essential element of his claim in this case that he was acting within the scope of his employment when he was injured. Therefore, as a matter of law, he could not prevail in this action. On the same facts, Ruiz also filed a motion for partial summary judgment to be entered in his favor on this same issue. The relevant facts relied on by both parties were, and are, undisputed.

The Second District Court for Weber County, State of Utah, denied Ruiz's motion and granted Southern Pacific's motion for summary judgment. On appeal, the Utah Court of Appeals affirmed. The Utah Supreme Court denied Ruiz's petition for writ of certiorari. The specific, undisputed facts relevant to the decisions of the courts below are:

1. In May 1990, Ruiz was an employee of Southern Pacific assigned to work on Southern Pacific's tracks and right-of-way at Lakeside, Utah, which required him, and the other members of his work gang, to live at Southern Pacific's work camp at Montello, Nevada. Montello is approximately 75 miles from Lakeside. (R. 174-75, 254.)

2. The entire work gang customarily assembled at Montello at 5:00 a.m. and traveled together to the work site at Lakeside

by company truck, which would take approximately two hours, during which time they were under Southern Pacific's control and direction, and were paid for their time. (R. 175-76, 259-60, 304.)

3. However, prior to the date of the accident, Ruiz voluntarily requested permission not to travel to Lakeside with the other gang members in the company truck because, for his own convenience, he wanted to drive his own vehicle to Lakeside so that, at the end of the workday, he could leave directly from Lakeside for his home in Ogden, Utah, rather than returning that evening to Montello with his work gang. (R. 175, 305-14, 498-99.)

4. Ruiz's request was granted by his supervisor with the understanding that since Ruiz would not be under Southern Pacific's supervision, Ruiz would not be paid for his time nor reimbursed for his use of his own vehicle. (Id.)

5. On the day of the accident, May 18, 1990, Ruiz did not gather with the rest of the work gang in the company truck, or submit himself to the supervision or control of Southern Pacific, but he left after the gang left, and drove his own car for his own convenience to the work site at Lakeside. (R. 175, 311-15.)

6. On the day of the accident, Ruiz's on duty point, for the purpose of receiving compensation, was agreed to be Lakeside. (R. 314, 414.)

7. Ruiz was not paid for the time he spent commuting in

his car that day, nor was he reimbursed for his own use of his vehicle. (R. 176.)

8. Ruiz was injured in a rollover accident 14 miles away from Lakeside, before he had reported for duty at Lakeside. (R. 166-68, 287, 395.)

The Utah courts below granted, and affirmed, summary judgment for Southern Pacific because upon these undisputed facts of record, at the time of the accident, Ruiz was pursuing his own personal objective of driving his own car to the work site so that he could conveniently get home earlier after work. Ruiz did not have to drive his own car and his doing so did not benefit Southern Pacific. Moreover, Southern Pacific had no control over or ability to supervise Ruiz while he was driving his own car. The courts below found that all other courts that have considered the scope of employment issue have concluded, under circumstances involving the employee's exercise of his own choice and the employer's lack of control or supervision, that such employees were acting outside the scope of their employment when injured. The Utah courts merely followed this precedent in also holding that Ruiz was acting outside the scope of his employment when he rolled his car.

REASONS FOR DENYING THE WRIT

I.
THE DECISIONS BY THE UTAH COURTS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT.

Ruiz has argued before this Court that there is a major conflict in decisions coming out of various circuit courts, and that the decision of the Utah Court of Appeals adds to this conflict. He does so because Rule 10 of this Court states that conflicting decisions is the type of reason this Court considers in granting certiorari. Indeed, this Court's rule provides that "a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Nevertheless, there is no relevant conflict in the decisions of the Utah Court of Appeals and any other court. Therefore, there is no compelling reason for this Court to grant Ruiz's petition.

The decisions below, granting and affirming Southern Pacific's motion for summary judgment, do not conflict with the decisions of this Court or any other court. To the contrary, the decisions of both the trial court and the Utah Court of Appeals are soundly reasoned, and conform to applicable federal FELA case law. It is significant that Ruiz does not make the claim before this Court that any other court has entered a ruling or opinion, on the same or similar set of facts, that holds an FELA employee, or any employee, was acting within the scope of his employment. Indeed, all applicable FELA case law holds that an employee is outside the scope of his/her employment when pursuing

his/her own objectives beyond the control and supervision of his/her employer when injured. Ruiz does not even attempt, before this Court, to claim otherwise.

Ruiz did argue to the Utah Supreme Court that it should exercise its discretion to again review this case *de novo*, after the Utah Court of Appeals had affirmed the summary judgment ruling, because there were conflicting decisions from that court as well as this Court. Ruiz has discarded that argument in the instant petition to this Court. He did so for good reasons. There are no decisions from Utah, any other state court, any federal district or circuit court or this Court that conflict with the holdings of the Utah trial court and court of appeals entered in this case.[1] There simply is no conflicting case authority for the substantive legal holding that upon the uncontested facts of record Ruiz was acting outside the scope of his employment when he rolled his car because he was pursuing personal objectives outside the control and supervision of his employer.

Before this Court, Ruiz now takes the novel approach, never before taken in this case, that the quantity and quality of the evidence somehow resulted in a judgment that is in conflict with other circuit court opinions. It is impossible to understand the applicability of Ruiz's argument because he never explains how it is relevant in the context of this case.

---

[1] The Argument section of Southern Pacific's "Brief of Respondent in Opposition to Petition for Writ of Certiorari to Review the Decision of the Court of Appeals," that was filed in the Utah Supreme Court, is reprinted as Appendix A hereto for the benefit of the Court.

Ruiz argues that other court decisions pertaining to the evidentiary requirements imposed upon FELA plaintiffs to withstand a motion for summary judgment, on the issue of scope of employment as well as other issues that are inapplicable to this case, are in conflict, citing to various circuit court opinions. However, neither the trial court nor Utah Court of Appeals ever considered the specific issue that some other evidentiary requirement is imposed on Ruiz in this case. Those courts below merely applied, without objection, the traditional standard imposed by Rule 56, Utah Rules of Civil Procedure, that is similar to the Federal Rules of Civil Procedure, which requires summary judgment to be entered if the evidence of record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ruiz never raised the issue below that a different standard existed as to the specific issue involved in this case so that either the trial court or appellate court could consider his argument. Thus, Ruiz's argument before this Court that the Utah Court of Appeals has rendered an opinion regarding evidentiary standards that conflict with other cases makes no sense in the context of this case. Moreover, there are additional reasons why this Court should not review this new issue raised by Ruiz.

Generally, this Court will not consider any issue that was not raised in the courts below. *E.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) ("[Q]uestion was not raised in the Court of Appeals and is not properly before us"); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). *See also, Ramsey v. United Mine Workers,* 401 U.S. 302, 311-12 (1971)(finding consideration of an issue not presented below

inappropriate for lack of support in the record). Thus, this Court should not grant a writ of certiorari to consider Ruiz's new issue, that the Utah courts below did not have a chance to consider, on which there is no record.

In addition, the case authority cited by Ruiz does not establish that any conflict exists between any two courts on the issue of whether summary judgment is appropriate, and indeed required, when on undisputed facts of record there is no reasonable basis to conclude that a FELA plaintiff is acting within the scope of his/her employment. The cases cited by Ruiz are in accord that summary judgment as a matter of law is warranted simply when there are no facts of record to support all the necessary elements of a FELA cause of action.

For example, in *Brady v. Southern Ry.*, 320 U.S. 476, 479-80 (1943), this Court applied the traditional judgment as a matter of law analysis to the issue of whether the railroad was negligent in failing to furnish a reasonably safe place to work, and finding for the railroad the Court stated that "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict." *See also Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 228-29 (1959)(applying traditional judgment as a matter of law analysis and finding on the facts that reasonable men could differ on whether the plaintiff was even an employee; therefore that issue should have gone to the jury); *North Carolina R.R. v. Zachary*, 232 U.S. 248, 258-61 (1914)(applying traditional judgment as a matter of law analysis and finding an essential fact in doubt requiring a remand of the case for a jury trial on the issue of whether an employment

relationship existed); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1362 (9th Cir. 1995)(finding no material factual disputes on the issue of respondeat superior in a FELA action and granting summary judgment on that issue for the railroad); *Brown v. CSX Transp. Inc.*, 18 F.3d 245, 248-50 (4th Cir. 1994)(applying traditional directed verdict analysis and finding no legally sufficient evidentiary basis for a reasonable jury to find for the FELA plaintiff and directing verdict for the railroad); *Harbin v Burlington Northern R.R.*, 921 F.2d 129, 130-32 (7th Cir. 1990)(applying traditional summary judgment analysis and holding that genuine issue of material fact precluded grant of summary judgment in favor of railroad on negligence issue); *Wilson v. Chicago, M., St. P. & Pac. R.R.*, 841 F. 2d 1347, 1352-58 (7th Cir. 1988)(applying traditional summary judgment analysis and holding that genuine issue of material fact precluded grant of summary judgment in favor of railroad on scope of employment issue); *Gill v. Pennsylvania R.R.*, 201 F.2d 718, 721-22 (3rd Cir. 1953)(applying traditional directed verdict analysis and finding no evidentiary support for jury verdict for FELA plaintiff and entering judgment for railroad); *Turpin v. Chicago, Burlington & Quincy R.R.*, 403 S.W.2d 233 (Mo. 1966)(applying traditional directed verdict analysis and finding no employment relationship as a matter of law); *Vinyard v. Missouri Pac. R.R.*, 632 S.W.2d 272 (Mo. Ct. App. 1982)(applying traditional directed verdict analysis and finding issues in dispute so that jury should resolve the issue of whether employment relationship existed).

Other cases, more on point but not cited by Ruiz, agree that the traditional summary judgment analysis, as applied by the Utah courts below, is the proper "evidentiary standard" for the issue of whether an employee is outside the scope of employment. *See, e.g., Rogers v.*

Chicago & Northwestern Transp., 947 F.2d 837 (7th Cir. 1991)(finding no factual dispute and holding as a matter of law plaintiff not within scope of employment; summary judgment granted); *Fowler v. Seaboard Coastline R.R.*, 638 F.2d 17 (5th Cir. 1981)(finding no factual dispute and holding as a matter of law plaintiff not within scope of employment; summary judgment granted); *Thompson v. National R.R. Passenger Corp.*, 774 F. Supp. 1087, 1088 (N.D. Ill. 1991), *aff'd*, 966 F.2d 1457 (7th Cir. 1992)(finding no factual dispute and holding as a matter of law plaintiff not within scope of employment; summary judgment granted); *Williams v. Norfolk Southern Ry.*, 767 F. Supp. 756 (E.D.Va. 1991)(applying traditional summary judgment analysis and holding as a matter of law plaintiff not within scope of employment; summary judgment granted). *Cf. Getty v. Boston & Maine Corp.*, 505 F.2d 1226 (1st Cir. 1974)(applying traditional directed verdict analysis and finding plaintiff outside scope of employment as a matter of law); *Quirk v. New York, C. & St. L. R.R.*, 189 F.2d 97 (7th Cir. 1951), *cert. denied*, 352 U.S. 871 (1951)(applying traditional directed verdict analysis and finding plaintiff outside scope of employment as a matter of law).

The remaining cases cited by Ruiz are all irrelevant. They have nothing to do with the issues involved in this case. For example, Ruiz cites to a Sixth Circuit decision, *Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803 (6th Cir. 1996), to demonstrate a conflict. The *Aparicio* court considered, and resolved for the Sixth Circuit, questions regarding the quantum of evidence standard necessary to overcome a directed verdict on the issue of *employer negligence* in a FELA action. *Aparicio*, 84 F.3d at 806-15. The court noted a line of cases requiring a FELA plaintiff to show a "scintilla of evidence tending to show negligence" to overcome a motion for a directed verdict on the *employer negligence* issue. *Id.* at808-09. The court also noted a line of

cases requiring a FELA plaintiff to show something more than a "scintilla" to overcome a motion for a directed verdict on the *employer negligence* issue. *Id.* at 809-10.[2] To resolve this"conflict," the Sixth Circuit ultimately adopted a requirementthat a FELA plaintiff must show "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Id.* at 810.

The *Aparicio* court clearly did not consider the question at issue in the case at bar of whether the alleged injury occurred while the employee was acting within the scope of his/her employment. Thus, any "conflict" as to the question of evidence necessary to prove employer negligence does not affect the Utah courts' rulings that as a matter of law, on the undisputed facts of record, Ruiz was not acting within the scope of his employment when he was injured. The profound difference in these two legal issues is obvious.

Moreover, the employer negligence issue was not the only issue considered by the *Aparicio* court. The *Aparicio* court, in the same decision, upheld the lower court's granting of the railroad's summary judgment motion on the basis that the plaintiff's action was not filed within three years as required by statute. 45 U.S.C. § 56. Applying traditional summary judgment analysis, that lower court found no material factual dispute, much like the Utah trial court on the issue of

---

2 The Aparicio court admitted that this "conflict" it presented may not be a real conflict at all, stating that its disagreement with apparently contrary authority "may be based upon a distinction without a difference. 'More than a scintilla' means precious little more than a scintilla given the Supreme Court's view that Congress has favored Federal Employers' Liability Act plaintiffs with a jury resolution of all colorable factual issues." 84 F.3d at 810 (citing *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957)).

scope of employment. To this extent, *Aparicio* is in accord that summary judgment is warranted simply when there are no facts of record to support all the necessary elements of a FELA action.[3]

Also, Ruiz has failed to establish a conflict between *Aparicio*, the Seventh Circuit in *Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 841 F.2d 1347 (7th Cir. 1988), and the Missouri state courts in *Turpin v. Chicago, Burlington & Quincy Railroad Co.*, 403 S.W.2d 233 (Mo. 1966) and *Vinyard v. Missouri Pacific Railroad Co.*, 632 S.W.2d 272 (Mo. Ct. App. 1982) which he claims exists.

The *Wilson* court, unlike the Sixth Circuit in *Aparicio*, considered the FELA scope of employment issue in the context of summary judgment. *Wilson*, 841 F.2d 1352-58. Quoting Rule 56 of the Federal Rules of Civil Procedure and citing to this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Wilson court explained that "a party opposing a summary judgment motion must 'set forth specific facts showing that there is a genuine issue for trial.'" *Wilson*, 841 F.2d at 1352. The court further stated:

> 'Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury.' That is precisely the familiar sum-

[3]This includes the element of "employer negligence." Ruiz cites to no case authority which holds that for purposes of summary judgement a different evidentiary standard applies to this element other than the traditional summary judgement standard. The *Aparicio* court was considering the amount of evidence neccesary to allow the issue of employer negligence to go to the jury in the context of a motion for *directed verdict*. Neither *Aparicio*, nor *Rogers v. Missouri Pacific Railroad Co.*, relied upon by the *Aparicio* court, stand for the proposition that in the context of a motion for summary judgement brought by the employer the motion should be denied even when there are no facts of record to reasonably support the conclusion that the employer was negligent.

> mary judgment standard. While having a jury is 'part and parcel of the remedy afforded railroad workers' under FELA, there must be a genuine issue of material fact for the jury to determine.

Id. at 1354 (quoting *Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 228 (1959)(other citations omitted).

The plaintiff in *Wilson* argued that the quality of evidence must be less than that traditional summary judgment standard, based on this Court's opinion in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). The circuit court disagreed and adhered to the traditional summary judgment standard and analysis on the scope of employment issue. The court then explained that to effectuate FELA's pure comparative negligence provisions, the Court in *Rogers* held that the defendant's ***negligence*** must go to the jury on even the slightest proof of ***employer negligence***. However, when the issue is whether the plaintiff was in the scope of employment, as opposed to employer negligence, Rule 56 governs as traditionally applied. *Wilson*, 841 F.2d at 1353.

The Sixth Circuit in *Aparicio* never considered the scope of employment issue on summary judgment, as did the Seventh Circuit in *Wilson*. Because the cases focused on different issues, they cannot, by definition, conflict. Moreover, the *Wilson* court upheld the application of a traditional summary judgment analysis to the scope of employment element of a FELA cause of action; thus, it is in complete harmony with the analysis applied by the Utah courts below. No case has been cited that conflicts with the holding of the *Wilson* case.

Like the court in *Wilson*, the Missouri courts decided issues separate and distinct from the issues in *Aparicio*. The Supreme Court of Missouri in *Turpin v. Chicago, Burlington & Quincy Railroad Co.*, 403 S.W.2d 233 (Mo. 1966), for example, considered in the context of a directed verdict the issue of whether an employee was "employed" by the railroad company (and thus covered by FELA) as a result of being employed by the railroad's wholly-owned subsidiary trucking company. Applying reasoning similar to that of the Seventh Circuit in *Wilson*, the Missouri Supreme Court rejected the *Rogers* "slightest evidence" standard because the issue was not *employer negligence*, but rather the existence of employment. Therefore, the court applied traditional directed verdict analysis, and ultimately upheld the directed verdict for the railroad on the employment question. *Turpin*, 403 S.W.2d at 237-42.

In a later Missouri Court of Appeals case also cited by Ruiz, *Vinyard v. Missouri Pacific Railroad Co.*, 632 S.W.2d 272 (Mo. Ct. App. 1982), the court considered a nearly identical set of facts, that is, was an employee "employed" by the railroad company (and thus covered by FELA) as a result of being employed by the railroad's wholly-owned subsidiary trucking company. *Id.* at 274. Applying the same standards as the *Turpin* court, the appellate court nevertheless found factual issues yet to be resolved by a jury, and therefore reversed the granting of a directed verdict. *Id.* at 274-77.

The two Missouri cases do not conflict with each other, except as to facts. The two courts applied the same legal analysis. Neither do these two cases conflict with the Seventh Circuit in *Wilson*. They all employed similar, traditional legal analyses. Finally, these three cases

do not conflict with the Sixth Circuit in *Aparicio*, as alleged by Ruiz, because the Aparicio court considered wholly separate and distinct issues, yet also applied a traditional judgment as a matter of law analysis.

Ruiz attempts to create conflict when none exists. This case is in complete harmony with all known cases that have construed and applied the law in the context of whether a FELA plaintiff is within or without the scope of his/her employment when injured. There being no conflict, especially with respect to the specific issue decided in the case at bar, between the decision of any court and the Utah courts below, there is no compelling reason for this Court to grant certiorari to once again review this issue.

II.

PETITIONER'S ARGUMENT THAT A FELA PLAINTIFF'S EMPLOYMENT STATUS IS GENERALLY A QUESTION FOR THE JURY IS MISLEADING AND MERITLESS.

A FELA plaintiff's employment status is not necessarily a question for the jury. Instead, each case must be analyzed on its own facts. Plaintiff's argument to the contrary is overbroad, unfounded and misleading.

Ruiz states in oversweeping terms in his petition that "[t]his Court long ago determined that the issue of whether a railroad worker was employed in commerce is generally for the jury." (Pet. at 9.) To support that broad proposition, Ruiz cites to this Court's opinions in *North Carolina Railroad Co. v. Zachary,* 232 U.S. 248 (1914), and

New York Central & Hudson River Railroad Co. v. Carr, 238 U.S. 260 (1915). However, Ruiz's misleading proposition finds no support in these opinions from this Court.

The *Zachary* Court considered the issue of whether a railroad employee was "employed in commerce" at the time of an accident which took the employee's life, so as to bring the employee within the FELA. The Court determined that the evidence was conflicting, and that therefore the issue should have gone to the jury. *Zachary*, 232 U.S. at 258-61. The *Zachary* Court made no sweeping statements to support Ruiz's proposition. Nor did the Court state, or imply, that each factual scenario would result in the same outcome. The Court simply applied the traditional summary judgment analysis, found material facts in dispute, and remanded the issue for jury resolution. The *Carr* Court considered a similar issue, and, citing to *Zachary*, affirmed judgment for the plaintiff. *Carr*, 238 U.S. at 261-64. Again, no sweeping statements exist within the text of *Carr* to support Ruiz's overreaching proposition.

Neither case states, or implies, that the scope of employment issue always is for the jury. If relevant facts are in dispute, then the dispute is resolved by the trier of fact. If the facts are not in dispute and do not reasonably support a finding on this necessary element of the plaintiff's case, then the question may properly be kept from the trier of fact. At their broadest, these cases merely support traditional summary judgment analysis and the general proposition that the trier of fact resolves genuine issues as to material facts. Indeed the other cases cited by Ruiz,as well as other authority as discussed in the preceding point, all refute the broad conclusion Ruiz asks this Court to make.

Ruiz's argument on this issue is without merit. Ruiz misleads the Court by citing to cases which do not support, even by inference, Ruiz's broad proposition. Again, this Court has been given no compelling reason to grant certiorari.

III.
RUIZ ONLY WANTS ANOTHER CHANCE TO REARGUE HIS CASE.

This Court has expressly indicated that it does not routinely review questions of fact. Sup. Ct. R. 10. *See also NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) ("[W]e are presented primarily with a question of fact, which does not merit Court review."); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) ("[U]ltimate facts are subject to the 'clearly erroneous' rule, and their review would be of no importance save to the litigants themselves. The appropriate disposition in such a situation is to dismiss the writ as improvidently granted."). And even when a petition for certiorari is granted, this Court has refused to review the factual findings below. *United States v. Johnston*, 268 U.S. 220, 227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts."). Such a refusal to review factual findings is consistent with the Court's desire to review those cases that are important not just to the parties themselves, but to the public as a whole. *See Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955)("[I]t is important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ."). In addition to not reviewing factual findings below, this Court's own recently amended rules also state that a "petition . . . is

rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Despite Ruiz's attempt to create conflicts where none exist, in the end Ruiz simply requests that this Court grant certiorari to review the facts and then reconsider his legal arguments regarding how the facts of record support his contention rather than the trial court's and Utah Court of Appeals' conclusions. The facts are undisputed, and the general principles of law are undisputed.

Ruiz merely interprets the facts and law differently than Southern Pacific, the trial court and the Utah Court of Appeals.[4]

---

[4]In his arguments below Ruiz construed the evidence of record differently than Southern Pacific, the trial court and the Utah Court of Appeals. Hence, he most likely will argue again before this Court that his version of the facts and law are correct. Indeed, Ruiz states in his petition:

> In any event in this case, unlike the two cited cases, there were disputed factual issues....
>
> Despite the evidence as to the disputed facts, the Utah Court of Appeals held that "[t]he undisputed facts show that Ruiz was not within the scope of employment in furtherance of interstate commerce at the time of his accident."

(Pet. at 14-15.) Ruiz was making reference to the Collective Bargaining Agreement between Southern Pacific and Ruiz's union that was before the trial court and the court of appeals. Ruiz argued that agreement required Southern Pacific to pay Ruiz for his time while he was driving his car to the worksite. The trial court and court of appeals rejected Ruiz's interpretation of the agreement. The Utah Court of Appeals stated:

> Rule 30 of the Collective Bargaining Agreement provides, however, that "[e]mployees shall not be allowed time while traveling . . . between their homes and designated assembling points, or for other personal reasons." Thus, because Ruiz was traveling in his own vehicle for personal reasons, he was not entitled to pay.

(Pet., App. at A-10.) Moreover, even if the fact that Ruiz was not entitled to pay at the

Interestingly, no prior court has had occasion to apply the general, and well established, legal principles applicable to this case to facts similar to the unique facts of this case. Thus, this case follows no precise precedent and it likely will not set any precedent that would be expressly applicable to any other case.

If certiorari is granted, this Court will merely be required to apply its own analysis of the same legal principles applied by the Utah courts below to the same undisputed facts of record. There is no reason for this Court to grant certiorari simply to reconsider Ruiz's arguments that have consistently been rejected. A grant of certiorari would waste this Court's finite resources and preclude it from utilizing its time elsewhere. Therefore, Ruiz's petition should be denied.

IV.

THE DECISIONS BELOW WERE DECIDED CORRECTLY, AND THUS ANY REVIEW BY THIS COURT WOULD RESULT IN THE SAME OUTCOME.

The Utah courts below correctly considered the issue of whether or not Ruiz was acting within the scope of his employment when he was injured. They found no factual dispute and ruled, as a matter of law, that Ruiz was not acting within the scope of his employment when

---

time he was injured was disputable, it is not material. Railroad employees have been determined to be outside the scope of their employment when they are pursuing their own interests beyond the supervision of their employer even when entitled to pay as a contractual benefit of their employment. *See Fowler v. Seaboard Coastline R.R.*, 638 F.2d 17 (5th Cir. 1981). Thus, Ruiz's interpretation of the facts and law clearly is misplaced, and his request to be able to have an opportunity to express his erroneous and irrelevant views to this Court should be rejected. (*See also, infra*, App. at 12a-13a.)

he was injured.

The issue of when an employee such as Ruiz acts inside or outside the course of his/her employment has arisen under varying factual circumstances. As Southern Pacific presented to the courts below, most analogous to the facts of this case is the line of cases commonly referred to as "commuter cases." These cases generally involve the factual situation of an employee traveling under his own volition and control, without his employer's supervision, to or from work by means chosen by the employee without employer compulsion. The courts confronted with this factual scenario consistently have held that the employee is outside the scope of his or her employment. *E.g.*, *Rogers v. Chicago & North Western Transp.*, 947 F.2d 837 (7th Cir. 1991); *Fowler v. Seaboard Coastline R.R.*, 638 F.2d 17 (5th Cir. 1981); *Metropolitan Coal Co. v. Johnson*, 265 F.2d 173 (1st Cir. 1959); *Atchison, T. & S.F. Ry. v. Wottle*, 193 F.2d 628 (10th Cir. 1952); *Quirk v. New York, C. & St. L. R.R.*, 189 F.2d 97 (7th Cir. 1951), *cert. denied*, 342 U.S. 871 (1951); *Sassaman v. Pennsylvania R.R.*, 144 F.2d 950 (3rd Cir. 1944).

The common factors which provided the foundation for these courts' decisions are: 1) the employee's exercise of his or her own choice in mode of travel; and 2) the employer's lack of control over the employee or the risks the employee may take in getting to or from work. A review of the decisions of the Utah courts below reveals that those courts properly considered these factors in accordance with FELA precedence. (R. at 429, 437; Pet., App. at A-9 to -11.)

Ruiz voluntarily rejected going with defendant to the place

where he was to work on the day of the accident, although Ruiz had the opportunity to do so and in fact customarily had submitted himself to the control and supervision of Southern Pacific on previous occasions in getting to the work site. Ruiz elected to go to the work site by himself in his own automobile for his own personal reason of facilitating his earlier arrival at home for the weekend. He chose to drive for his own benefit.

Additionally, because Ruiz chose not to start his work at the work camp with his gang and go with them in Southern Pacific's truck, under Southern Pacific's control, to the work site, Southern Pacific had no control over when, or if, Ruiz would leave the camp site or arrive at the work site to report for duty. Consequently, Southern Pacific had no control over Ruiz's conduct (*e.g.*, whether he would wear his seat belt), Ruiz's car, (*e.g.*,whether it was properly maintained), or Ruiz's use of his own car (*e.g.*, whether he would speed or drive recklessly). Southern Pacific did not compel Ruiz to drive his own car, and had no control over the risks Ruiz voluntarily took in getting to work that day.

These facts are not disputed. Based on these facts, the courts below were correct in granting summary judgment to Southern Pacific as a matter of law on the issue of whether Ruiz was acting within the scope of employment. Any review by this Court would result in the same outcome. If not, decades of applicable FELA precedence would be overturned. Thus, Ruiz's petition should be denied.

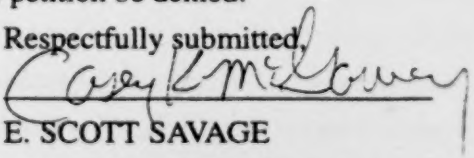
CONCLUSION

Ruiz is not without a right to seek legal recourse for his injuries

simply because his FELA action has properly been dismissed. Ruiz still can pursue his pending common law negligence action against Southern Pacific. Ruiz has informed this Court that he has a severe head injury that renders him mentally incompetent. That alleged fact, even if true, has no relevance to the arguments Ruiz makes in his petition. It apparently has been asserted only to incite sympathy. This Court should not grant certiorari out of sympathy, especially where Ruiz continues to have a viable cause of action against Southern Pacific.

The Utah courts below correctly decided that as a matter of law, upon the record before them, Ruiz was injured while acting outside the scope of his employment for purposes of maintaining a FELA cause of action. The courts below correctly applied the traditional summary judgment standard and analysis, in conformity with Utah law and federal precedence. The decisions below do not conflict with any decisions of this Court or any other court. Those decisions also are correct in light of applicable legal principles and FELA case authority. Ruiz's arguments are misplaced and incorrect. He only seeks another chance to reargue his case before this Court. Southern Pacific, therefore, requests that the petition be denied.

Respectfully submitted,



E. SCOTT SAVAGE
Counsel of Record
CASEY K. MCGARVEY
BERMAN, GAUFIN, TOMSIC & SAVAGE
Attorneys for Respondent
50 South Main, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

APPENDIX A

IN THE UTAH SUPREME COURT

JOSE RUIZ,	)	
Plaintiff/Petitioner	)	Appellate Court No.
vs.	)	940661-CA
SOUTHERN PACIFIC	)	District Court No. 910900648
TRANSPORTATION	)	(Priority No. 15)
COMPANY,	)	
Defendant/Respondent.	)	

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS [Dated March 29,1996]

An Appeal from the Second District Court
Weber County
Judge Michael D. Lyon

THE CROW LAW FIRM
Donald S. Britt
Gerald J. Adler
700 "E" Street
Sacramento, California 95814
(916) 441-2980
GRIDLEY, WARD, HAVAS
HAMILTON & SHAW
Erik M. Ward (3380)
635 25th Street
Ogden, Utah 84401
(801) 621-3317
Attorneys for Plaintiff/Petitioner

BERMAN, GAUFIN, TOMSIC & SAVAGE
E. Scott Savage (2865)
Casey K. McGarvey (4882)
50 South Main Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200
Attorneys for Defendant/ Respondent

ARGUMENT

Plaintiff contends that the "special and important reason" for the issuance of a writ in this case is to correct a "conflict with decisions of the United States Supreme Court and decisions of this Court." (Plaintiff's petition, pages 4, 11, 13, 15 and 17). However, Plaintiff has not demonstrated that there is any inconsistency with or departure from controlling law. Indeed, the decision of the Court of Appeals is in complete harmony with all federal and state cases that have considered when an employee has acted within the course of his employment under the FELA. Therefore, Plaintiff's contention is erroneous. There is no reason for this Court to allow Plaintiff a third opportunity merely to reargue his position.

POINT I
PLAINTIFF HAS NOT CITED TO ANY DECISION OF THIS COURT THAT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS.

Plaintiff has cited throughout his petition to eight decisions rendered by this Court. In none of them did this Court hold that under facts similar to the undisputed facts before the Court of Appeals that a railroad employee was acting within the course of his employment for purposes of coming under the coverage of the FELA. None of those cases even involved this specific issue or the FELA.[2] Moreover, it is

---

[2] *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056-59 (Utah 1989)("the issue was whether improper sexual contact between a therapist and a patient falls within the scope of the therapist's employment" under the doctrine of respondeat superior, and this Court held it did not as a matter of law); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1038, 1040-43 (Utah 1991)(under the doctrine of respondeat superior, where the

significant that six of these eight cases where not cited by Plaintiff in his briefs to the Court of Appeals.[3] The two that were cited by Plaintiff,

---

primary motivation of an employee's activity is personal and that activity is a substantial diversion from the employee's duties so as to constitute an abandonment of employment, that employee, as a matter of law, will be held to be acting outside the scope of employment, but in this particular case this Court found that "[m]any of the facts underlying Clover's claims are in dispute" precluding summary disposition); *Martinson v. W-M Insurance Agency, Inc.*, 606 P.2d 256, 258 (Utah 1980)(in affirming the denial of compensation under the Utah Worker's Compensation Act to an insurance salesman injured in an automobile accident, this Court stated that "if the predominate motivation and purpose of the activity is in serving the social aspect, or other personal diversion of the employee, even though there may be some transaction of business or performance of duty merely incidental or adjunctive thereto, the person should not be deemed to be in the course of his employment"); *Park Utah Consolidated Mines Co. v. Industrial Comm'n*, 103 Utah 64, 133 P.2d 314, 317 (1943)(in a workmen's compensation case, this Court confirmed the "rule that there can be no workmen's compensation for an accident sustained going to or from work" because of the fact that the employee selects "the particular way, means and conveyance for going to and from work," but where the "means for entrance [to his employment] are limited so that he has no choice as to the mode of entrance, all of the hazards which are peculiar to such entrance attach to his employment"); *Soldier Creek Coal Co. v. Bailey*, 709 P.2d 1165 (Utah 1985)(in a workmen's compensation case, this Court held as a matter of law that an employee's death did not arise out of or in the course of his employment, for purposes of considering the applicability of the Utah Worker's Compensation Act, where the employee was thrown from his own automobile while he was driving to work, specifically holding that exceptions to this going-to-and-from work rule recognized in workmen's compensation cases did not apply upon the undisputed facts); *State Insurance Fund v. Industrial Comm'n*, 15 Utah 2d 353, 393 P.2d 397 (1964)(this Court affirmed an order awarding workmen's compensation benefits where the employee was held to be within the course of his employment because he was travelling from one office where he already had began his work to another office where he would continue his work). See also Bountiful Brick Co. v. Giles, 68 Utah 600, 251 P. 555 (1926), aff'd, 276 U.S. 155 (1928) and Cudahy Packing Co. v. Parramore, 60 Utah 161, 207 P. 148 (1922), aff'd, 263 U.S. 418 (1923), both of which are discussed in Footnote 4.

[3] This is significant because in order to preserve a plea of error the alleged error must have been raised below in order to allow that court to correct any error, if error there be. *Utah County v. Brown*, 672 P.2d 83 (Utah 1983). *Cf. Warburton v. Virginia Beach Federal Sav. & Loan Ass'n*, 899 P.2d 779 (Utah App. 1995) (argument not raised at trial cannot be raised on appeal).

Bountiful Brick Co. v. Giles, 68 Utah 600, 251 P. 555 (1926), aff'd, 276 U.S. 154 (1928) and *Cudahy Packing Co. v. Parramore*, 60 Utah 161, 207 P. 148 (1922), aff'd, 263 U.S. 418 (1923), also are not on point and of no significance.[4] Regardless of what plaintiff represents in his written argument to this Court, the truth is that no Utah Supreme Court decision conflicts with the decision of the Court of Appeals in this case. Plaintiff's request should not be granted for this reason.

POINT II
PLAINTIFF HAS NOT CITED TO ANY DECISION OF THE UNITED STATES SUPREME COURT THAT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS.

Plaintiff also has cited throughout his petition to five Supreme Court cases in addition to the Bountiful Brick and Cudahy Packing cases discussed in Point I. Three of those cases also were not cited by

---

[4] In both of these cases, the imposition of liability under the Utah Workmen's Compensation Act was affirmed because there was found to be a "causal connection" between the injury and the employment. 276 U.S. at 158; 263 U.S. at 423-24. In both cases, the employee was killed while crossing over railroad tracks adjacent to their work places which they necessarily had to cross in order to get to where they needed to be to perform their duties for their employers. Hence, although only a "causal connection" between the injury and the employment was held to be sufficient under the state worker's compensation act, the analysis still required, as do the FELA cases discussed hereafter, that the injury resulted from a risk that the employee necessarily had to take and not a risk the employee chose to, but did not have to, take in order to perform his duties for his employer. 276 U.S. at 159 ("it was necessary for the employees, in order to get to the place of work, to cross the tracks, and they were in effect invited by the employer to do so"); 263 U.S. at 426 ("Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work, and he was in effect invited by his employer to do so"). In the case at bar, Ruiz was invited, and in fact would have been paid, to travel to the work site with his gang in Defendant's truck, but he voluntarily chose to drive his own car instead, and forego any pay, for his personal reasons.

Plaintiff below, and they do not address the issue of when a railroad employee legally is deemed to be acting within the course of his employment for purposes of construing the applicability of the FELA[5] The two other cases merely support preliminary issues pertaining to the scope of the FELA and they also do not conflict with the holding of the Court of Appeals.[6] Again, the cases cited by Plaintiff do not support Plaintiff's contention that decisions from the United States Supreme Court conflict with the decision of the Court of Appeals in this case. There is no reason for this Court to grant Plaintiff's petition.

POINT III

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH APPLICABLE FELA CASE LAW.

---

[5] Baker v. Texas & Pac. Ry, 359 U.S. 227 (1959)(held that a question of fact existed as to whether the plaintiff, a workman for a third party contractor, also was "employed" by the railroad within the meaning of the FELA; there was no dispute that the plaintiff was injured while performing his duties within the course of his employment for the third party contractor); Kelley v. Southern Pac. Co., 419 U.S. 318 (1974)(held that a person is deemed to be "employed" by a railroad under the FELA where there is a master-servant relationship, which requires a finding that the railroad exercises control over the person; there was no dispute that the plaintiff, if so "employed," was injured while performing his duties within the course of his employment for the trucking company for whom he worked); Ward v. Atlantic Coast Line RR, 362 U.S. 396 (1960)(held that a question of fact existed as to whether a railroad sectionman was an "employee" of the railroad for purposes of FELA coverage when he was working on a third party's track on his day off and was being paid by that third party; there was no dispute that the sectionman was injured while performing his duties in repairing the track of the third party).

[6] Chesapeake & Ohio Ry v. Kuhn, 284 U.S. 44 (1931)(the FELA is governed by common law as interpreted and applied in the federal courts, not state courts); Robinson v. Baltimore & Ohio RR, 237 U.S. 84 (1915)(in denying FELA coverage, it was held that a person employed by a third party was not "employed" by the railroad merely because his duties for his third party employer required him to work on a train; thus, "employee" and "employed" used in the FELA are "intended to describe the conventional relation of employer and employee").

The issue of when an employee acts inside or outside the course of his employment for purposes of construing FELA coverage has arisen under varying factual circumstances. Most analogous to the facts of the instant action are cases commonly referred to as "commuter cases." Commuter cases generally involve the factual situation of an employee travelling under his own volition, and without his employer's supervision, to or from his work site in a manner chosen by the employee without compulsion by the employer. In these cases, it is consistently held that employees are outside the course of their employment even if they are on their employer's property or riding in their employer's train or vehicle.[7]

The two common factors underlying the decisions in the commuter cases is the employee's exercise of his own choice in his mode of travel and the employer's lack of control over the employee or the risks the employee may take in getting to or from the work site. Applying these factors to the instant case compels the conclusion that the Court of Appeals properly affirmed summary judgment for Defendant. Ruiz voluntarily rejected going with the Defendant to the work site on the day of the accident, although Ruiz had the opportunity to do so and in fact customarily had submitted himself to the control

---

[7] In chronological order, cases pertaining to employees travelling from a work cite include Young v. New York, New Haven & Hartford RR, 74 F.2d 251, 253 (2nd Cir. 1923), and 79 F.2d 844, 845 (2nd Cir. 1935); Sassaman v. Pennsylvania RR, 144 F.2d 950, 953 (3rd Cir. 1944); Quirk v. New York, Chicago, & St. Louis RR, 139 F.2d 97, 100-01 (7th Cir. 1951), cert. denied, 342 U.S. 871 (1951); Williams v. Norfolk S. Ry, 767 F. Supp. 756, 759 (E.D. Va. 1991), and cases pertaining to employees traveling to a work cite include Metropolitan Coal Co. v. Johnson, 265 F.2d 173, 178 (1st Cir. 1959); Spoonamore v. Louisville and Nashville RR, 179 F. Supp. 290, 292 (E.D. Ky. 1959); Getty v. Boston & Marine Corp., 505 F.2d 1226, 1228 (1st Cir. 1974); Thompson v. National Railroad Passenger Corp., 774 F. Supp. 1087, 1088 (N.D. Ill. 1991), aff'd, 966 F.2d 1457 (7th Cir. 1992). In all of these cases FELA coverage was denied.

and supervision of Defendant on previous occasions in getting to the work site. Plaintiff elected to go to the work site by himself in his own automobile for his own personal reason of having his car available to him to use in getting home from work earlier. In other words, he did not have to drive to the work site in his own car in order to do his work that day. He chose to drive for his own benefit.

In addition, because Plaintiff chose not to start his work at the work camp with his gang and go with them in Defendant's truck to the work site, Defendant had no control over when, or if, Plaintiff would leave the camp site or arrive at the work site to report for duty, nor did Defendant have any control over Plaintiff, the Plaintiff's car, or his use of his car. As further evidence in support of these factors, Plaintiff voluntarily chose not to be paid until he reported for duty at the work site.

This case falls squarely within the reasoning of the commuter cases that deny FELA coverage. Therefore, the Court of Appeals was correct in affirming summary judgment for Defendant as a matter of law.

POINT IV
THE FELA CASES RELIED UPON BY PLAINTIFF AREINAPPLICABLE ON THE UNDISPUTED FACTS OF THIS CASE.

Plaintiff does not deny the existence and affect of the line of FELA cases known as commuter cases. However, he emphasizes other lines of cases. These other lines of cases apply to other factual situations

that are inapplicable where an employee is travelling pursuant to his own choices and without the control or supervision of the employer to where he is to report for his work assignments. Plaintiff's cases, therefore, do not help Plaintiff on the facts of record before this Court.

One line of cases cited by Plaintiff pertains to the factual situation where an employee is injured at an employer provided work camp.[8] These cases are referred to herein as "work camp" cases. These work camp cases all involve negligence which occurred *at the camp* or *place* where the injured employee was required or encouraged by his employer to stay in order to rest and prepare to perform his work. The employers in these cases clearly had control over the camp facilities and/or benefitted from the employees staying at the work camps. These cases do not suggest that an employee who has left his work camp in his own vehicle and for his own personal agenda remains covered by the FELA while he operates his motor vehicle at any speed and in any manner of his own choosing, as did Ruiz.

The Tenth Circuit case of *Atchison, Topeka & Santa Fe Railway Co. v. Wottle*, 193 F.2d 628 (10th Cir. 1952) particularly is instructive on this point. In *Wottle*, a laborer, shortly after returning from the work site to his company provided camp site, left in his own automobile to

---

[8] Plaintiff cited the following cases to the Court of Appeals and in his petition: *Chicago, Milwaukee, St. Paul & Pac. RR v. Kane*, 33 F.2d 866, 868 (9th Cir. 1929), *cert. denied*, 280 U.S. 588 (1929); *Mostyn v. Delaware, Lawanna & W. RR*, 160 F.2d 15, 17-18 (2nd Cir. 1947), *cert. denied*, 332 U.S. 770 (1947); *Casso v. Pennsylvania RR*, 219 F.2d 303, 305-06 (3rd Cir. 1955). Plaintiff now also cites, for the first time, the following two cases involving facts along this same line: *Baum v. Baltimore & Ohio RR*, 256 F.2d 753 (7th Cir. 1958); *Empey v. Grand Trunk W. RR*, 710 F. Supp. 653 (E.D. Mich. 1987). Interestingly, the *Baum* Court held that the employee, who was in the process of leaving the work camp at the time, was outside the course of this employment.

go buy groceries for himself. The laborer was killed while still on his employer's property when attempting to drive over the tracks. *Id.* at 630-31. The court in *Wottle* found that the laborer's own choice to drive his own car in pursuit of his own objectives was not a necessary incident to his employment so as to bring him within the coverage of the FELA. To rule otherwise, the court reasoned, would in effect mean that "there is no limitation upon the coverage [of the FELA] so long as there is a possibility that the employee will return to his work-a-day duties," and then stated, "[o]bviously, the legislation was not intended to go so far." Id. at 631. See also *Loya v. Denver & Rio Grande W. RR*, 993 F.2d 1551 (10th Cir. 1993)(unpublished opinion which is attached hereto); *Rogers v. Chicago & North W. Transp.*, 947 F.2d 837 (7th Cir. 1991); *Fowler v. Seaboard Coastline RR*, 638 F.2d 17 (5th Cir. 1981).

In the case at bar, Ruiz was not at the work camp or work site. He was not under the control or direction of Southern Pacific at the time. Defendant did not receive any benefit from Plaintiff's choosing to drive his own car to the work site so he could conveniently get home sooner for the weekend. Ruiz was injured while pursuing his own interests. Thus, the work camp cases relied upon by Plaintiff are inapplicable on the facts of this case.

Plaintiff also relies on a line of cases that pertain to the factual situation where an employee is injured on or near his employer's property in order to perform the specific job to which he is assigned. These cases are different from the commuter cases because the employee is injured after arriving at the general area where his work is to be performed, and it is found that the employee's being in the area in which he is injured was necessary in order for the employee to get to

precisely where he needed to be in order to accomplish his work.[9] These cases are referred to herein as "traversing the work site" cases. In all of these traversing the work site cases, as opposed to the commuter cases, the employee was not pursuing his own interest, nor was he exercising his own choice as to the means by which he got to or from the actual work site. Rather in these cases, the employee already had arrived at work and was required by his employer to go where the injury occurred as part of or in preparation for the performance of his duties. Clearly, what the employee was doing in these cases was for the benefit of his employer because it was necessary for the performance of his required duties.

These cases provide no help to Plaintiff under the facts of record. Ruiz had not yet arrived at the work site before he drove his car off of the road. He was 14 miles away from where he was to report to his supervisor and obtain his assignment for the day. He had not yet reported to work, and he was not traversing the work site to get to the exact location where he was to perform his duties for Defendant on that day.

The fact that Plaintiff was on Defendant's property at the time of his accident is not significant. The traversing the work site cases do not find the employee to be within his employment because he is on his employer's property. Many of the employees were on their employer's property in the commuter cases, discussed in Point III, and the employees in the *Wottle*, *Fowler* and *Rogers* cases, cited above in this

---

[9] Plaintiff cited the following cases to the Court of Appeals and in his petition: Carter v. Union RR, 438 F.2d 208 (3rd Cir. 1971); Caillouette v. Baltimore & Ohio Chicago Terminal RR, 705 F.2d 243 (7th Cir. 1983).

point, were on their employer's property at the time of injury, yet they were found not to be within the course of their employment at the time. See also *Aldredge v. Baltimore & Ohio RR*, 20 F.2d 655, 658-60 (8th Cir. 1927), *cert. denied*, 275 U.S. 550 (1927); *Symonski v. Central RR*, 131 A. 628, 629-30 (N.J. 1926), aff'd, 135 A. 921 (1927).[10] Obviously, the very nature of the traversing the work site cases most likely will place the employee on his employer's property at the time of injury, and at least very close to where the employee's duties are to be performed. Nevertheless, whether or not an employee is on his employer's property is not a determinative factor in the analysis of whether the employee is within the course of his FELA employment at the time of injury.[11]

In the instant action, Ruiz had a safe way to get to the work site that was under the control of the Defendant. He could have travelled with the rest of his gang in Defendant's truck, as he had done prior to the accident, and had he done so on the day of the accident, Defendant could have assured his safety through, among other things, its maintenance of the truck, control of the speed it was driven and required use of seat belts. However, Plaintiff chose to pursue his own interests. His choice was not necessary for him to perform his duties for Defendant

---

[10] The only cases Plaintiff cites in opposition to this FELA authority are cases discussing Utah law construing the "going-to-and-from-work rule" and the "premises exception" to that rule as they are applied in state workmen's compensation cases. The FELA is not a workmen's compensation statute. Moreover, the United States Supreme Court clearly has held that the FELA is governed by common law interpreted by federal courts, not state courts. Chesapeake, Ohio Ry v. Kuhn, 284 U.S. 44 (1931). No FELA case law supports Plaintiff's contention that is contrary to the FELA authority cited in the text.

[11] See also Restatement (Second) of Agency § 229 cmt. c (1958) ("the fact that the acts are done upon the master's premises or with his instrumentalities is . . . not conclusive").

any more than it would be for any commuter going to work. Plaintiff's FELA cases do not compel a determination different than the determination made by the Court of Appeals after it had carefully considered all these FELA cases on the issue before it.

POINT V
NO ERROR WAS COMMITTED IN AFFIRMING SUMMARY JUDGMENT.

Plaintiff suggests that because of the Union Agreement Plaintiff could not voluntarily take himself out of the course of his employment when he substituted personal transportation for company transportation, for personal reasons, and thereby removed himself from the control and supervision of his employer. It is ludicrous for Plaintiff to argue that no matter what he did for personal reasons he could not remove himself from the course of his employment. The *Wottle*, *Loya*, *Rogers* and *Fowler* cases, cited above, expressly negate this argument.[12] There are no cases supporting Plaintiff's argument.

In addition, Plaintiff tries to argue that genuine issues of fact exist that were ignored by the Court of Appeals. In reality, Plaintiff simply is trying to create an issue of fact by arguing that the Union Agreement required Defendant to pay Plaintiff for the time he spent driving his own car to work, and that this fact supports the legal conclusion that Plaintiff was within the course of his employment. This straw-man argument fails because there is no competent evidence of record that the Union Agreement required that Plaintiff be paid for the

---

12 See text, *supra*, at pp. 14-15 [8a-9a.]

time he spent driving his own car. The Union Agreement speaks for itself and expressly provides that employees will not be paid when travelling for personal reasons. (R. 369.) Moreover, even if Plaintiff was entitled to compensation under the Union Agreement, Plaintiff still would be outside the course of his employment. See Loya attached hereto. Hence, Plaintiff was outside the course of his employment regardless of whether or not the Union Agreement allowed Plaintiff to claim pay during his commute as a contractual benefit of his employment.

Contrary to Plaintiff's contentions of error, uncontroverted FELA authority supports finding an employee to be outside the course of his employment when he voluntarily chooses to commute to work in his own vehicle on his own schedule and for his own benefit, during which time he was not furthering his employer's business and was not under the control or direction of his employer. Summary judgment is completely in harmony with FELA principles and case law.